JAYA HARTA REALTY SDN BHD

v.

KOPERASI KEMAJUAN PEKERJA-PEKERJA LADANG BHD; TETUAN ISHARIDAH, HO, CHONG & MENON (GARNISHEE)

HIGH COURT MALAYA, ALOR SETAR
VINCENT NG J
[SUIT NO: 22-20-1995]
8 MARCH 2000
[2000] CLJ JT(5)

CIVIL PROCEDURE: *Execution - Stay - Garnishment order - Stay of judgment pending appeal and stay of proceedings - Whether distinguishable - Whether 'special circumstances' factor still applicable - Conditions imposed by court to better maintain balance of convenience - Rules of the High Court 1980, O. 45 r. 11*

The plaintiff sued and obtained judgment against the defendant in the sum of RM665,851.20 with interest and costs for moneys due upon certain contract works carried out on the defendant's land ('Lot 2790'). The defendant then sold Lot 2790 to another company known as Skyline View Sdn Bhd for RM4 million. In that sale, the garnishees, a firm of solicitors which processed the documentation on the sale, became the stake-holder of the purchase price of Lot 2790.

The plaintiff took out garnishment proceedings under O. 49 Rules of the High Court 1980 ('RHC'), and a garnishment order to show cause dated 18 April 1995 was served on the garnishees under cover of a letter dated 6 May 1995 from the plaintiff's then solicitors. It was fixed for hearing on 6 February 1996 and adjourned thrice, until 21 January 1997 when the garnishment order was made absolute, and until then the garnishees did not file any affidavit of objection to the garnishment order. The ensuing application by the garnishees, *inter alia,* to set aside the garnishment order was dismissed by the senior assistant registrar. The garnishees then appealed to the judge in chambers. The appeal was allowed and the garnished money was, on 28 April 1999, ordered to be returned to the garnishees on or before 12 May 1999 with interest. The plaintiff appealed to the Court of Appeal against the judge's order of 28 April 1999 and then applied to the judge to have the said order stayed pending its appeal.

Held:

[1] The court's power to stay proceedings should not be confused with its power to stay the execution of a final judgment or order.

[2] The justice of the case on stay is arrived at by striking a judicious and equitable balance between the principle that the successful party in litigation ought to be allowed to reap the fruits of his litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not to be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory. It must always be borne in mind that the successful party in litigation has acquired a vested interest in the outcome of his case whereas the other party who appeals only has an interest contingent upon a successful outcome on his appeal. And, it is primarily for this latter reason and the implied caveat that courts should discourage parties who lose their cases upon merits, from wrenching the fruits of litigation from the successful parties – by keeping the litigation alive through spurious appeals without any real prospect of success and simply in a hope of gaining respite against immediate execution upon the judgment – that the courts have been and are only moved to grant such stay upon a set of certain requirements which, for want of a more appropriate term, the courts have been driven to use, quite rightly, the expression 'special circumstances'.

[3] Thus 'special circumstances' does not mean very special or exceptional or peculiar circumstances but is a term to denote a combination of certain determining factors that are demonstrated by affidavit evidence to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances.

[4] An applicant for stay has to demonstrate – not by mere speculation or argument – an appropriate case to bring it within the term 'special circumstances', failing which weight must be given to the fact that the judgment has been in favour of the other party who is entitled to the fruits of his litigation – a *fortiori* a judgment entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof). The three essential ingredients (the traditional core ingredients) necessary to demonstrate 'an appropriate case' to warrant the exercise of discretion in favour of a stay, are: (i) where the balance of convenience is in favour of the applicant/appellant; (ii) where it is apparent that unless a stay is granted an appeal will be rendered nugatory; and (iii) where the applicant/appellant has an arguable appeal.

[5] The courts here and in the Commonwealth jurisdictions have in essence traditionally adopted as core ingredients the above three generic ingredients for granting stay, with some variations where appropriate depending on the peculiar facts and circumstances of the case. One may term it 'special circumstances' or 'appropriate case' yet the basic ingredients for granting stay bear insignificant variation from the said three traditional core ingredients. The 'nugatory' ingredient is not an exclusive or singular but an essential condition precedent, which, if not made out to the satisfaction of the court, a stay ought not to be granted, whatever the merits of the appeal and the balance of convenience. And, for obvious reasons, any one of the aforesaid three traditional core ingredients would not suffice to tilt the balance in favour of a stay.

[6] In the current case special circumstances had been shown as: the contention that if a stay was not granted the appeal, if successful, would be rendered nugatory was not seriously challenged; the balance of convenience was clearly in favour of a stay; and the plaintiff has an arguable appeal since the court records disclosed gross indifference on the part of the garnishees towards the garnishment order which was indeed grounded upon a legally and regularly obtained judgment debt due and outstanding from the defendant.

[7] In order to better maintain the balance of convenience, stay of execution of the judgment of 28 April 1999 was allowed subject to certain terms. This was consistent with O. 45 r. 11 of the RHC.

[Application for stay of execution of judgment allowed upon terms.]

Case(s) referred to:

AG v. Emerson & Ors [1889] 24 QBD 56 ***(refd)***
Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(refd)***
All Persons in the house etc in Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 ***(refd)***
Andrews & Anor v. John Fairfax & Sons Ltd [1979] 2 NSWLR 184 ***(refd)***
Atkins v. GW Ry [1886] 2 TLR 400 ***(refd)***
Bank Bumiputra (M) Bhd v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 ***(refd)***
Barker v. Lavery [1885] 14 QBD 769 ***(refd)***
Brook v. Emerson [1906] 95 LT 821 ***(refd)***
Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584 ***(refd)***
Clyne v. Deputy Commissioner of Taxation [1982] 56 ALJR 857 ***(refd)***
Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***
Erinford Prop Ltd & Anor v. Cheshire County Council [1974] Ch 261 ***(refd)***
Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd [1997] 1 CLJ 70 ***(refd)***
Government of Malaysia v. Datuk Hj Kadir Mohd Mastan & Anor Application [1993] 3 MLJ 521 ***(refd)***

Griffith v. Benn 27 TLR 346 ***(refd)***
Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227 ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***
Lee Kuan Yew v. Jeyaretnam JB [1991] 1 MLJ 83 ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***
London Permanent Benefit Building Society v. De Baer [1969] 1 Ch 321 ***(refd)***
Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board [1945] KB 394 ***(refd)***
McPhail v. Persons, Names Unknown [1973] Ch 447 ***(refd)***
Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***
Monk v. Bartram [1981] 1 QB 346 ***(refd)***
Re Calicut Bank Ltd [1938] 8 Comp Cas 313 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(refd)***
Re Middle Harbour Investments Ltd (In liquidation) (CA 15 December 1976 unreported) ***(refd)***
Scarborough v. Lew's Function Stores Pty Ltd (193) VR 129 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] 19 MLJ 116 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
Tang Chok Ching v. Wong Ik Tieng & Ors [1973] 2 MLJ 25 ***(refd)***
TC Trustees Ltd v. FS Darwen (Successors) [1969] 2 QB 295 ***(refd)***
The Annot Lyle [1886] 11 PD 114 ***(refd)***
Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547 ***(refd)***
Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 1 CLJ 568 ***(refd)***
Wilson v. Church (No 2) [1879] 12 Ch D 454 ***(refd)***
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 45 r. 11, O. 49

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 17, paras 451, 455, pp 269, 272

For the appellant plaintiff - Ram Kumar; M/s Morgan & Co
For the respondent garnishee - Steven Puung; M/s Isharidah, Ho, Chong & Menon

Reported by Gan Peng Chiang

JUDGMENT

Vincent Ng J:

Before me is an application (*vide* encl. 98) by the plaintiff company ('plaintiffs'), under O. 45 r. 11 of the Rules of the High Court 1980 ('the Rules'), to stay an order granted by my predecessor on 28 April 1999 setting aside a garnishment order made by the learned senior assistant

registrar, garnishing the sum of RM842,037.24 held by the respondent/ garnishee ('garnishees'), a legal firm practising under the name and style of M/s. Isharidah, Ho, Chong & Menon. The 28 April 1999 order also ordered the plaintiffs to return the garnished funds to the garnishees. The plaintiffs' application for garnishment was grounded upon a regularly obtained judgment debt against the defendant company/judgment debtor (defendants).

The events leading to the application are as follows. The plaintiffs had been engaged by the defendants to do some work on the defendants' land, identified as Lot 2790, Mk. Sungai Petani, Daerah Kuala Muda, held under Geran no. 64729 (the 'said land'). After completing the contracted work, the plaintiffs sought payment of RM665,851.20. The defendants, however, informed the plaintiffs that they were for the time being, unable to pay due to shortage of funds. At the same time the defendants requested for further time as they were in the midst of negotiating a sale of the said land to a company known as Syarikat Skyline View Sdn. Bhd. (hereinafter to be referred as 'Sykt. Skyline View'). And, in the event that the deal was successful, the land would be sold at RM4 million, and payment to the plaintiffs could then be effected.

Despite this assurance no payment was received. Thus, the plaintiffs instituted the present suit and proceeded to sign judgment in default against the defendants on 18 April 1995. The plaintiffs having knowledge of the purported sale of the land to Sykt. Skyline View also became aware of the fact that the garnishees had been appointed by Sykt. Skyline View as solicitors in the sale and purchase transaction. As solicitors, they were also acting as stakeholders of the sale price. Thus, to reap the fruits of its final judgment the plaintiffs took out garnishment proceedings under O. 49 of the Rules against the garnishees. The learned senior assistant registrar allowed the plaintiffs' application, resulting in the garnishees filing an application (*vide* encl. 27) to, *inter alia*, stay the execution proceedings of the garnishment order dated 21 January 1997 and also to set aside the garnishment order dated 21 January 1997. This application by the garnishee was dismissed by the senior assistant registrar after he heard submissions. The garnishees then appealed (*vide* encl. 61) to the judge in chambers against the senior assistant registrar's order of dismissal. On 28 April 1999, the learned judge allowed the appeal. The garnishment order was set aside and the plaintiffs were ordered to return the garnished money to the garnishees on or before 12 May 1999 with interest. The plaintiffs appealed to the Court of Appeal against this order of 28 April 1999 *vide* Court of Appeal Civil Appeal no: K02-335-99. At the same time the plaintiffs filed the present application before me (encl. 98) to stay the execution of the judge's said order pending the disposal of their appeal to the Court of Appeal.

At the hearing of encl 98, the parties were on common ground that the court has unfettered discretion to grant a stay of execution, but the court's powers should only be exercised when there exist special circumstances, as an appeal does not operate as a stay. Though, I must observe that initially the plaintiffs' counsel betrayed a befuddled and bemused thought process, when in his written submission he said: "In Malaysia there are two (2) principles formulated by the courts on the stay principle namely: (i) that there must be 'special circumstances' shown; and, (ii) on the 'nugatory' principle. Both these principles stand as the law today." In order to demonstrate the existence of special circumstances the plaintiffs contended that besides having an arguable appeal and the balance of convenience in their favour, if the order is not stayed and the money returned to the garnishees, who in turn may release the money to either the defendants or Sykt Skyline View (if so instructed), there will no funds available to satisfy the judgment that they had obtained against the defendants, should the plaintiffs succeed in their said appeal against the learned judge's order of 28 April.

This case affords this court an opportunity to attempt to unravel the apparent conflict between on the one hand, the principles for stay of execution of **judgment** pending appeal, adopted and applied in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 19 MLJ 116, and entrenched in the Federal Court in *Kerajaan Malaysia v. Jasanusa Sdn. Berhad* [1995] 2 CLJ 701; [1995] 2 MLJ 105 and *Kerajaan Malaysia v. Dato Hj. Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119 (where in all three cases stay of execution of judgment was granted), and on the other hand, the principles for stay of **proceedings** pending appeal propounded by the Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn. Bhd. & Ors* [1997] 2 CLJ 299; [1995] 3 MLJ 598 (where stay of proceedings was refused, but it went on to declare the judgment of Brown J in *Serangoon Garden* on stay of execution to be: 'bad law, and ought no longer to be followed by this court').

On the topic under discussion it may perhaps be of assistance to take excerpts from para. 455 (at p. 272) of the *Halsbury's Laws of England*, vol 17 (4th edn) which reads: "The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing." And, on the distinction between stay of execution of a final judgment or order and stay of proceedings, it may also be pertinent to set out para. 451 (at p. 269) of the same volume in *Halsbury's*, which states: "The court's power to stay proceedings should not be confused with its power to stay the execution of a final judgment or order. The court has an inherent jurisdiction to control its own

proceedings so as to prevent an abuse of process, and accordingly to stay proceedings which are frivolous, vexatious or harassing, or which are manifestly groundless or in which there is clearly no cause of action in law or equity, or where the justice of the case so requires. The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself." A further distinction to note is that in stay of proceedings cases the court's inherent jurisdiction is invoked, whereas applications for stay of execution of judgment are, in our High Courts, governed by a specific provision, being O. 45 r. 11 of the Rules. Order 45 r. 11 provides that: "Without prejudice to O. 27 r. 1, a party **against whom a judgment has been given or an order made may apply to the court for a stay of execution of the judgment or order** or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order **grant such relief, and on such terms, as it thinks fit.**"

Besides the above cases there is a welter of case authorities and judicial pronouncements on the question stay of execution of judgment pending appeal here and from Commonwealth jurisdiction spanning a period of well over a century from the English case of *Wilson v. Church (No. 2)* [1879] 12 Ch D 454 until present day. An attempt at distillation of the law on this topic would not be possible without also reading the discussions on the issues and the principles expounded and applied in cases such as: *Wilson v. Church (No. 2)* [1879] 12 Ch D 454, *Barker v. Lavery* [1885] 14 QBD 769; *Atkins v. GW Ry* [1886] 2 TLR 400; *The Annot Lyle* [1886] 11 PD 114; *Annot Lyle, The* [1886] 11 PD 114; *A-G v. Emerson* [1889] 24 QBD 56; *Brook v. Emerson* [1906] 95 LT 821; *Calicut Bank Ltd, Re* [1938] 8 Comp Cas 313; *Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board* [1945] KB 394; *Scarborough v. Lew's Function Stores Pty Ltd* (193) VR 129 at p. 130; *TC Trustees Ltd v. FS Darwen (Successors)* [1969] 2 QB 295; *London Permanent Benefit Building Society v. De Baer* [1969] 1 Ch 321; *Tang Chok Ching v. Wong Ik Tieng & Ors* [1973] 2 MLJ 25; *McPhail v. Persons, Names Unknown* [1973] Ch 447; *Erinford Prop Ltd & Anor v. Cheshire County Council* [1974] Ch 261; *Re Middle Harbour Investments Ltd (In liquidation)* (Court of Appeal, 15 December 1976) (unreported); *Re Kong Thai Sawmill (Miri) Sdn. Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd & Ors (No. 2)* [1976] 1 MLJ

131; *Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126; *Bank Bumiputra (M) Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Andrews & Anor v. John Fairfax & Sons Ltd* [1979] 2 NSWLR 184; *Monk v. Bartram* [1981] 1 QB 346 CA; *Clyne v. Deputy Commissioner of Taxation* [1982] 56 ALJR 857; *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406; *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42; *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408; *A-G v. Emerson & Ors* [1889] 24 QBD 56; *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 3 MLJ 40; *Lee Kuan Yew v. Jeyaretnam JB* [1991] 1 MLJ 83; *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; [1987] 2 MLJ 377; *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd. Taufek* [1994] 1 CLJ 547; [1994] 1 MLJ 356; *Whu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 AMR 39:2313; *Gentali (M) Sdn. Bhd v. Kawasaki Sunrock Sdn. Bhd.* [1997] 1 CLJ 70; [1996] 3 MLJ 597; *All Persons in the house etc in Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49; [1996] 2 AMR 1855.

The terms in which the court's jurisdiction is conferred on stay of execution pending an appeal are general and unlimited. How the judicial discretion conferred by that jurisdiction should be exercised must be guided by proper rules founded on principle.

The justice of the case on stay is arrived at by striking a judicious and equitable balance between the principle that the successful party in the litigation ought to be allowed to reap the fruits of that litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory. Yet, it must always be borne in mind that the successful party in litigation has acquired a vested interest in the outcome of his case whereas the other party who appeals only has an interest contingent upon a successful outcome on his appeal – obviously, one has to be mindful that such considerations pertaining to the compelling concept of 'fruits of litigation' is wholly irrelevant to stay of proceedings applications. And, it is primarily for this latter reason and the implied caveat that courts should discourage parties who lose their cases upon merits, from wrenching the fruits of litigation from the successful parties – by keeping the litigation alive through spurious appeals without any real prospect of success and simply in a hope of gaining respite against immediate execution upon the judgment – that the courts have been and are only moved to grant such stay upon a set of certain requirements which, for want of a more appropriate term, the courts have been driven to use, quite rightly,

the expression 'special circumstances.' Thus, 'special circumstances' does not mean very special or exceptional or peculiar circumstances but is a term to denote a combination of certain determining factors that are demonstrated by affidavit evidence to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances. In other words the term 'special circumstances' for purposes of stay proceedings does not bear precisely the same meaning ascribed to it in *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86. In order not to impose a fetter on the exercise of the courts discretion whether to grant a stay of execution, myriad and various factors constituting special circumstances have been recognised by the courts in Commonwealth jurisdictions, and "how pertinent that factor would may vary according to the circumstances of each particular case" per Abdul Hamid J (as he then was) in *Mohd Mustafa v. Kandasami (No. 2)* (Federal Court [1979] 2 MLJ 126. I would therefore wholly and readily agree with the lucid views – expressed in potent language – of Ian HC Chin (JC as he then was) in *Govt. of M'sia v. Datuk Haji Kadir Mohd Mastan & Anor Application* [1993] 3 MLJ 521) who had this to say "I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised."

It follows that these are not matters of rigid principle and an applicant for stay has to demonstrate – not by mere speculation or argument – an appropriate case to bring it within the term 'special circumstances', failing which weight must be given to the fact that the judgment has been in favour of the other party who is entitled to the fruits of his litigation – a *fortiori* a judgment entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) (See *Griffith v. Benn* 27 TLR 346, 350; *Hong Leong Finance v. Hon Hoi Weng & Ors (supra), Re Kong Thai Sawmill (Miri) Sdn. Bhd* [1976] 1 (MLJ) 131; and *Syarikat Berpakat v. Lim Kai Kok (supra)*).

In *Alexander v. Cambridge Credit Corp Ltd (supra)*, although Kirby P, when delivering the judgment of the Court of Appeal of New South Wales, had frowned upon the use of the expression 'special or exceptional circumstances' in preference to 'an appropriate case', he nevertheless quite correctly (in my view) set out the following three essential ingredients (the traditional core ingredients) that are necessary to demonstrate 'an appropriate' case to warrant the exercise of discretion in favour of a stay, namely:

(i) where "the balance of convenience" is in favour of the applicant/appellant (see also *A.G v. Emerson & Ors (supra); Clyne v. Deputy Commissioner of Taxation (supra)*); and such balance of convenience may sometimes be maintained by the stay being made subject to certain conditions imposed by the court (as per provision '... may order ... on such terms as it thinks fit', in O. 45 r. 11 RHC, and also see *Andrews & Anor v. John Fairfax & Sons Ltd (supra*));

(ii) where "it is apparent that unless a stay is granted an appeal will be rendered nugatory…." (see also *Wilson v. Church No. 2 (supra)* and *Scarborough v. Lew's Junction Stores Pty Ltd (supra)*); and

(iii) that the applicant/appellant "has an arguable" appeal.

In my view, shorn of its contending terminology, the courts here and in the Commonwealth jurisdictions have in essence traditionally adopted as its core ingredients the above three generic ingredients for granting stay, with some variations where appropriate depending on the peculiar facts and circumstances of the case. One may term it 'special circumstances' or 'appropriate case' yet the basic ingredients for granting stay bears insignificant variation from the said three traditional core ingredients. The 'nugatory' ingredient is not an exclusive or singular but an essential condition precedent, which, if not made out to the satisfaction of the court, a stay ought not be granted, whatever the merits of the appeal and the balance of convenience. And, for starkly obvious reasons, any one of the aforesaid three traditional core ingredients would not suffice to tilt the balance in favour of a stay. That this is so is, in our own jurisdiction, confirmed by the Federal Court in *Mohd. Mustafa v. Kandasami (No. 2)* which, rightly and quite clearly, abided by the then established traditional principles, when, on the question of stay of execution, it intoned: "**One of the determining factors** that calls for consideration is whether by not making an order to stay the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal." As the phrase used was 'one of the determining factors' I would be misreading the gist or tenor of that decision to hold or to imply that the 'nugatory' factor was the sole or novel ingredient considered by that court or that, a fresh approach had been advanced or postulated therein.

Indeed, after careful reading of *See Teow Guan (supra)*, I find that therein the Court of Appeal had, quite rightly, adopted the three traditional core ingredients as its guideline principles when rejecting that application for a stay of the proceedings. Thus, on the ingredient 'balance of convenience' the appellate court was of the view that: "This is not a case where there will be a bitter opposition to the winding up of the first respondent. To delay the hearing and disposal of such a case as this will, in my judgment, cause a manifest injustice to the parties. It will also put the list of the

commercial court in hopeless disorder." And, enlarging on the same point, it observed that: "As against all this is to be weighed the consequences of granting a stay in this case. There is no doubt that the effect of such an order would be to prolong the disposal of what in essence is a simple matter. There will be a delay of several months while awaiting the hearing of an appeal that is bound to fail. Ultimately, after the passage of many wasted months, the petition will be heard unopposed and the first respondent will be wound up. When viewed in this way, it is not difficult to see where the justice of the case lies." The appellate court also found against the nugatory factor when it observed that: "The appellants will not suffer any prejudice. They want the first respondent to be wound up. The other respondents are agreeable to that course. So they will get their primary relief. They want the assets of the first respondent company to be distributed in specie. That, as I have said, is a matter over which the High Court has no jurisdiction at the hearing of the appellants' petition. But the appellants have, as I earlier observed, the right to raise this with the liquidator. He may or may not agree with the request. Either way, the party who is dissatisfied with the decision of the liquidator is entitled to raise the matter on a summons taken out before a judge of the High Court." And lastly, on merits of the appeal, it held: "Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure." Therefore, it is not surprising that the views expressed in *See Teow Guan (supra)* was not heeded in a very recent decision of the same court (different panel) in *Tropiland Sdn Bhd v. DCB Bank Bhd & Others* [2000] 1 CLJ 568; [2000] 2 MLJ 65. In *Tropiland*, when dismissing the application for stay of the High Court's writ of possession pending disposal of the applicant's appeal, it held: "We also found that the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd & Ors (No. 2)* [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay."

Having appraised myself of the established and entrenched legal principles, I will now apply them to the facts and consider whether in the case at hand, the plaintiffs had made out a case of special circumstances in terms as discussed above to justify granting a stay of execution.

I would wholly agree with Encik Ram Kumar's (the learned counsel for the plaintiffs) contention that if the stay is not granted the plaintiffs' appeal, even if successful, would be rendered nugatory. This is because the proceeds of the garnishment is the only source of satisfying the judgment debt. The said transfer of the said land (Geran No. 64729) was registered in the Registry of Titles on 1 December 1994. In the event that the stay

is not granted there is every likelihood that the garnishees, upon receiving the return of the garnished sum, may release the proceeds of sale of the said land to the judgment debtor or to Sykt Skyline View – the garnishees being duty bound to act according to instructions. Indeed, the garnishees themselves had, by letter to the plaintiffs' then solicitors dated 12 May 1995 (exh. 'PM2' of encl. 107) acknowledged that: "The Koperasi (defendants) had in their suit (Civil Suit No: 22-22-95) claimed for the return of the land which they alleged was fraudulently transferred to our clients;" and further added that: "In the light of His Lordship's decision, it cannot be gainsaid that the balance purchase price held by us has **crystalised into a debt due to the Koperasi.**" Furthermore, on the other hand, it was also contended that, should the garnished amount be released to Sykt Skyline for whatever reason, there was every possibility that the proceeds will be dissipated and utilised, and the plaintiffs will be deprived of the money, as a search conducted on the instructions of the plaintiffs had revealed that the garnished proceeds were Sykt. Skyline View's only assets. Thus, in support of encl. 98, the plaintiffs also appended a financial statement showing the financial status of Sykt. Skyline View (exh. 'GY-XVI' to encl. 99). It appears as follows:

PEJABAT PENDAFTAR SYARIKAT,
KEMENTERIAN PERDAGANGAN DALAM NEGERI
DAN HAL EHWAL PENGGUNA,
TINGKAT 11-17, PUTRA PLACE,
100 JALAN PUTRA, Talipon : 03-4433366
50622 KUALA LUMPUR Fax : 03-4437505

MAKLUMAT SYARIKAT

Nama syarikat	:	SKYLINE VIEW SDN. BHD.,
No. syarikat	:	211986-A
Tarikh penubuhan	:	30-JAN-91
Taraf	:	SENDIRIAN
Jenis	:	BERHAD DENGAN SAHAM
Alamat Daftar	:	LOT 907, TKT. 9 WISMA HLA, JALAN RAJA CHULAN, KUALA LUMPUR
Poskod	:	50200
Alamat Perniagaan	:	NO: 17, JLN. SEMANGAT, PETALING JAYA
Poskod	:	46200
Jenis Perniagaan	:	INVESTMENT HOLDING

MAKLUMAT MODAL

	JUMLAH (RM)	BIASA	PREFERENCE	LAIN-LAIN
DIBENARKAN	25000			
Jumlah Syer		25000	0	0
Dibahagikan kepada		25000	0	0
Amaun nominal sesyen (dalam sen)		100	0	0
DITERBITKAN	1002			
Tunai		1002	0	0
Selain dari tunai		0	0	0

Most importantly, it has to be noted that the garnishees had made no assertion that the said sum was not to be released, nor had they undertaken not to release the money to the defendants or to Sykt. Skyline View in the event that same is returned to it pursuant to the order of 28 April. The garnishees, being a legal firm whose duty is to release the money held by them – according to instructions – to whichever party is entitled to it, it is highly probable, judging from the evidence made available to this court, that in the event that the garnishees release the money to the defendants or to Sykt. Skyline View, the outcome of the plaintiffs' appeal if successful, would be nugatory. Furthermore, it was not disputed that the defendants do not have any substantial funds to satisfy the judgment debt due to the plaintiffs.

The above adumbrated considerations (reiterated here in part), and the circumstances of this case clearly points to a balance of convenience in favour of the plaintiffs, and such balance could also be maintained through the stay being granted subject to certain terms imposed by this court.

As to whether the plaintiffs' pending appeal is "obviously unarguable" or not, I am of the view that it is clearly arguable as the garnishees appear to be, at all times, aware of the garnishment proceedings. And, the onus is upon them to explain their non-appearance in court on various dates at the hearing of the garnishment order to show cause (encl. 8 dated 18 April 1995) served on the garnishees under cover of a letter dated 6 May 1995 (encl. 11) from the plaintiffs' then solicitors. Enclosure 8 was fixed for hearing on 6 February 1996, 9 April 1996, 11 June 1996, 3 September 1996 while the garnishment order was only made absolute on 21 January 1997. Indeed, regrettably, the court

records disclose gross indifference on the part of the garnishees, which led to the garnishment order being made absolute by the learned senior assistant registrar. Furthermore, there is also total failure on the part of the garnishees to file any affidavit of objection promptly or any time after service of the application for garnishment order until it was made absolute. It is also pertinent to note that the order originally obtained by the plaintiffs from the senior assistant registrar was a final garnishment order made absolute, which was grounded upon a legally and regularly obtained judgment debt due and outstanding from the defendants.

Accordingly, I allowed the application for stay, but subject to certain terms – consistent with O. 45 r. 11 of the Rules – in order to better maintain the balance of convenience, and I made the following orders:

(a) The amount RM842,037.24 be deposited within one month from the date of this order in a reputable bank in an interest bearing fixed deposit account on six monthly basis in the clients' account of the plaintiffs' solicitors, M/s. Morgan & Co., of Ipoh.

(b) The original of the fixed deposit receipt to be forwarded to this court within one week of the deposit of the amount and a copy thereof to be extended to the garnishee.

(c) The said amount of deposited to remain deposited in the said clients' account of M/s. Morgan & Co., until the disposal of the appeal to the Court of Appeal against decision of Yang Arif Dato' Mohd. Hishamudin dated 28 April 1999.

(d) The solicitors M/s. Morgan & Co., are to carry into effect (a) and (b) above within the stipulated period (as undertaken), failing which the garnishees are entitled to enforce the order dated 28 April 1999.

(e) Costs in the cause.